

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 24, 2006

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. BFI-2005-00012

Ex Parte: In re: proposed mortgage lender
and mortgage broker regulations

ORDER ADOPTING REGULATIONS

By Order entered in this case on February 11, 2005, the State Corporation Commission ("Commission") directed that notice be given of the Bureau of Financial Institutions' proposal to amend the Commission's Rules Governing Mortgage Lenders and Brokers, 10 VAC 5-160-10 et seq. of the Virginia Administrative Code. The Order and proposed amendments were published in the Virginia Register on March 7, 2005, posted on the Commission's website, and mailed to all licensees under the Mortgage Lender and Broker Act ("the Act"), § 6.1-408 et seq. of the Code of Virginia, and other interested persons. All interested persons were afforded an opportunity to file written comments and request a hearing.

Numerous written comments were filed but no request for a hearing was received. On April 25, 2005, the Commission entered an Order Directing Response to Comments, which required the Bureau of Financial Institutions ("Bureau") to file a response to the comments received on or before June 17, 2005. The Bureau filed its Response to Comments, which was delivered to all commenters. On July 12, 2005, the Commission entered an Order Permitting Further Responses, which authorized all commenters to file a reply to the Bureau's Response on or before August 26, 2005. Several of the commenters filed such a reply.

On January 17, 2006, the Commission entered an Order to Take Notice of modified proposed amended regulations and offered all interested persons an opportunity to file written

comments and request a hearing. The Order and modified proposed amended regulations were published in the Virginia Register on February 6, 2006, posted on the Commission's website, and mailed to all licensees under the Act. The Commission received eight comment letters addressing the modified proposed amended regulations but no requests for a hearing.

We have carefully considered the comments of interested persons and the Bureau. In response to such comments, we note that the final version of the regulations that we promulgate today, to be effective September 1, 2006, contains substantial and significant changes from the version initially proposed in the Order to Take Notice that was entered on February 11, 2005, many of which changes were in direct response to comments filed with the Commission.

NOW THE COMMISSION, having considered the record, the modified proposed amended regulations, and all of the comments, responses and replies filed in this case, concludes that the modified proposed amended regulations should be adopted with certain changes to 10 VAC 5-160-20. The Commission further concludes that the effective date of the regulations should be delayed in order to allow licensees a reasonable period of time to modify their practices to conform to the regulations.

THEREFORE, IT IS ORDERED THAT:

(1) The attached regulations, 10 VAC 5-160-10 et seq., are adopted effective September 1, 2006.

(2) The regulations shall be posted on the Commission's website at <http://www.scc.virginia.gov/caseinfo.htm>.

(3) An attested copy hereof, together with a copy of the regulations, shall be sent to the Registrar of Regulations for publication in the Virginia Register.

(4) This case is dismissed from the Commission's docket of active cases.

AN ATTESTED COPY hereof shall be sent to the Commissioner of Financial Institutions, who shall forthwith mail a copy of this Order, together with the regulations, to all licensed mortgage lenders and mortgage brokers and such other interested parties as he may designate.

CHAPTER 160
RULES GOVERNING MORTGAGE LENDERS AND BROKERS

10 VAC 5-160-10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Advertisement" means a commercial message in any medium that promotes, directly or indirectly, a mortgage loan. The term includes a communication sent to a consumer as part of a solicitation of business, but excludes messages on promotional items such as pens, pencils, notepads, hats, calendars, etc., as well as rate sheets or other information distributed or made available solely to other businesses.

"Affiliate" for purposes of subdivision 3 of § 6.1-411 of the Code of Virginia means an entity of which 25% or more of the voting shares or ownership interest is held, directly or indirectly, by a company that also owns a bank, savings institution, or credit union.

"Commission" and "commissioner" shall have the meanings ascribed to them in § 6.1-409 of the Code of Virginia.

"Commitment" means a written offer to make a mortgage loan signed by a ~~mortgage lender, or~~ by another person authorized to sign such instruments ~~offers~~ on behalf of a mortgage lender.

"Commitment agreement" means a commitment accepted by an applicant for a mortgage loan, as evidenced by the applicant's signature thereon.

"Commitment fee" means any fee or charge accepted by a mortgage lender, or by a mortgage broker for transmittal to a mortgage lender, as consideration for binding the mortgage lender to make a mortgage loan in accordance with the terms of ~~the~~ a commitment or as a requirement for acceptance by the applicant of a commitment, but the term does not include fees paid to third persons or interest.

"Fees paid to third persons" means the bona fide fees or charges paid by the applicant for a mortgage loan to third persons other than the mortgage lender or mortgage broker, or paid by the applicant to, or retained by, the mortgage lender or mortgage broker for transmittal to such third persons in connection with the mortgage loan, including, but not limited to, recording taxes and fees, reconveyance or releasing fees, appraisal fees, credit report fees, attorney fees, fees for title reports and title searches, title insurance premiums, surveys and similar charges.

"Lock-in agreement" means a written agreement between a mortgage lender, or a mortgage broker acting on behalf of a mortgage lender, and an applicant for a mortgage loan ~~which~~ that establishes and sets an interest rate and the points to be charged in connection with a mortgage loan that is closed within the time period specified in the agreement. A lock-in agreement can be entered into before mortgage loan approval, subject to the mortgage loan being approved and closed, or after such approval. A commitment agreement ~~which~~ that establishes and sets an interest rate and the points to be charged in connection with a mortgage loan that is closed within the time period specified in the agreement is also a lock-in agreement. The interest rate that is established and set by the agreement may be either a fixed rate or an adjustable rate.

"Lock-in fee" means any fee or charge accepted by a mortgage lender, or by a mortgage broker for transmittal to a mortgage lender, as consideration for making a lock-in agreement, but the term does not include fees paid to third persons or interest.

"Mortgage lender," "mortgage broker," and "mortgage loan" shall have the ~~meaning~~ meanings ascribed to them in § 6.1-409 of the Code of Virginia.

"Points" means any fee or charge retained or received by a mortgage lender or mortgage broker stated or calculated as a percentage or fraction of the principal amount of the loan, other than or in addition to fees paid to third persons or interest.

"Reasonable period of time" means that period of time, determined by a mortgage lender in good faith on the basis of its most recent relevant experience and other facts and circumstances known to it, within which the mortgage loan will be closed.

"Subsidiary" for purposes of subdivision 3 of § 6.1-411 of the Code of Virginia means an entity of which 25% or more of the voting shares or ownership interest is held, directly or indirectly, by a bank, savings institution, or credit union.

10 VAC 5-160-20. Operating rules.

A licensee shall conduct its business in accordance with the following rules:

1. No licensee shall ~~intentionally~~ misrepresent the qualification requirements for a mortgage loan or any material loan terms or make false ~~promises~~ or misleading statements to induce an applicant to apply for a mortgage loan or to induce an applicant to enter into any commitment agreement or lock-in agreement or to induce an applicant to pay any commitment fee or lock-in

fee in connection therewith. A "material loan term" means the loan terms required to be disclosed to a consumer pursuant to (i) the ~~federal Truth in Lending~~ Truth in Lending Act (15 USC §§ 1601-~~1647~~ et seq.), and regulations and official commentary issued thereunder, as amended from time to time, (ii) § 6.1-2.9:5 of the Code of Virginia, and (iii) 10 VAC 5-160-30 ~~of this chapter.~~ A misrepresentation or false or misleading statement resulting directly from incorrect information furnished to a licensee by a third party [, or a good-faith misunderstanding of information furnished by a third party,] shall not be considered a violation of this section if the licensee has supporting documentation thereof and the licensee's reliance thereon was reasonable.

2. No licensee shall retain any portion of any fees or charges imposed upon consumers for goods or services provided by third parties. All moneys received by a licensee from an applicant for fees paid to third persons shall be accounted for separately, and all disbursements for fees paid to third persons shall be supported by adequate documentation of the services for which such fees were or are to be paid. All such moneys shall be deposited in an escrow account in a bank, savings institution, or credit union segregated from other funds of the licensee.

3. The mortgagor who obtains a mortgage loan shall be entitled to continue to make payments to the transferor of the servicing rights under a mortgage loan until the mortgagor is given written notice of the transfer of the servicing rights by the transferor. The notice shall specify the name and address to which future payments are to be made and shall be mailed or delivered to the mortgagor at least 10 calendar days before the first payment affected by the notice.

4. If a person has been or is engaged in business as a mortgage lender or mortgage broker and has filed a bond ~~or letter of credit~~ with the commissioner, as required by § 6.1-413 of the Code of

Virginia, such bond ~~or letter of credit~~ shall be retained by the commissioner notwithstanding the occurrence of any of the following events:

- a. The person's application for a license is withdrawn or denied;
- b. The person's license is surrendered, suspended, or revoked; or
- c. The person ceases engaging in business as a mortgage lender or mortgage broker.

5. Within 15 days of becoming aware of the occurrence of any of the following events, a licensed mortgage lender or mortgage broker shall file a written report with the commissioner describing such event and its expected impact, if any, on the activities of the licensee in the Commonwealth:

- a. The licensee files for bankruptcy or reorganization.
- b. Any governmental authority institutes revocation or suspension proceedings against the licensee, or revokes or suspends a mortgage-related license held or formerly held by the licensee.
- c. Any governmental authority takes (i) formal ~~or informal~~ regulatory or enforcement action against the licensee relating to its mortgage business or (ii) any other action against the licensee relating to its mortgage business where the total amount of restitution or other payment from the licensee exceeds \$20,000. A licensee shall not be required to provide the commissioner with information about such event to the extent that such disclosure is prohibited by the laws of another state.
- d. Based on allegations by any governmental authority that the licensee violated any law or regulation applicable to the conduct of its licensed mortgage business, the licensee enters into, or

otherwise agrees to the entry of, a settlement or consent order, decree, or agreement with or by such governmental authority.

e. The licensee surrenders its license to engage in any mortgage-related business in another state in lieu of threatened or pending license revocation, license suspension, or other regulatory or enforcement action.

f. The licensee is denied a license to engage in any mortgage-related business in another state.

g. The licensee or any of its employees, officers, directors, or principals is indicted for a felony.

h. The licensee or any of its employees, officers, directors, or principals is convicted of a felony.

6. No licensee shall inform a consumer that such consumer has been or will be "approved," "preapproved," or "pre-approved" for a mortgage loan unless a mortgage lender has issued a written commitment, after a comprehensive analysis of the consumer's creditworthiness (including verification of income, resources, and other matters typically done as part of a normal credit evaluation program), which is conditioned solely upon (i) identification of a suitable property, if the subject property has not yet been identified; (ii) no material change in the applicant's financial condition or creditworthiness prior to closing; and (iii) limitations not related to the financial condition or creditworthiness of the applicant that a mortgage lender ordinarily attaches to a traditional mortgage application (such as completion of a home inspection, an acceptable title insurance binder, certification of a clear termite inspection, etc.) the licensee contemporaneously provides the consumer with a separate written disclosure (in at least 10-point type) that (i) explains what preapproved means; (ii) informs the consumer that the consumer's loan application has not yet been approved; (iii) states that a written commitment to make a mortgage loan has not yet been issued; and (iv) advises the consumer what needs to

occur before the consumer's loan application can be approved. This provision shall not apply to advertisements subject to 10 VAC 5-160-60. [In the case of a preapproval initially communicated to a consumer by telephone, the licensee shall provide the written disclosure to the consumer within three business days.]

10 VAC 5-160-30. Commitment agreements and lock-in agreements.

A. A commitment agreement shall include the following:

1. Identification of the property intended to secure the mortgage loan (this does not require a formal legal description);
2. The principal amount and term of the loan;
3. The interest rate and points for the mortgage loan if the commitment agreement is also a lock-in agreement or a statement that the mortgage loan will be made at the mortgage lender's prevailing rate and points for such loans at the time of closing or a specified number of days prior to closing;
4. The amount of any commitment fee and the time within which the commitment fee must be paid;
5. Whether or not funds are to be escrowed and for what purpose;
6. Whether or not private mortgage insurance is required;
7. The length of the commitment period;

8. A statement that if the loan is not closed within the commitment period, the mortgage lender is no longer obligated by the commitment agreement and any commitment fee paid by the applicant will be refunded only under the circumstances set forth in subsection C of this section and such other circumstances as are set forth in the commitment agreement; and

9. Any other terms and conditions of the commitment agreement required by the lender.

B. If a lock-in agreement is issued by a mortgage lender or mortgage broker to a consumer, it shall be signed by a representative of the mortgage lender or mortgage broker and include the following:

1. The interest rate and points for the mortgage loan, and if the rate is an adjustable rate, the initial interest rate and a brief description of the method of determining the rate (such as the index and the margin);

2. The amount of any lock-in fee and the time within which the lock-in fee must be paid;

3. The length of the lock-in period;

4. A statement that if the loan is not closed within the lock-in period, the mortgage lender is no longer obligated by the lock-in agreement and any lock-in fee paid by the applicant will be refunded only under the circumstances set forth in subsection D of this section and such other circumstances as are set forth in the lock-in agreement;

5. A statement that any terms not locked-in by the lock-in agreement are subject to change until the loan is closed at settlement; and

6. Any other terms and conditions of the lock-in agreement required by the mortgage lender or mortgage broker acting on behalf of a mortgage lender.

C. If an applicant has paid any commitment fee, and the mortgage loan is not closed due to any of the following, such commitment fee shall be refunded:

1. The commitment period was not a reasonable period of time given the prevailing market conditions at the time the commitment agreement was entered into;
2. The mortgage loan is turned down because of the applicant's lack of creditworthiness; or
3. The mortgage loan is turned down because of the appraised value of the property intended to secure the mortgage loan;

D. If an applicant has paid any lock-in fee and the loan is not closed because the lock-in period was not a reasonable period of time given the prevailing market conditions at the time the lock-in agreement was entered into, such lock-in fee shall be refunded.

E. A mortgage broker shall not issue a lock-in agreement to a consumer unless the mortgage broker has actually locked in the mortgage loan, including the applicable interest rate, points, and other terms, with a mortgage lender. A mortgage broker shall maintain supporting written confirmation documentation from the mortgage lender of all lock-in information for at least three years from the date the lock-in expires.

10 VAC 5-160-60. Advertising.

A. Every advertisement used by, or published on behalf of, a licensed mortgage lender or mortgage broker shall clearly and conspicuously disclose the following information:

1. The name of the mortgage lender or mortgage broker as set forth in the license issued by the commission.

2. A statement that the mortgage lender or mortgage broker is licensed by the "Virginia State Corporation Commission."

3. The license number assigned by the commission to the mortgage lender or mortgage broker (i.e., MB-XXX, ML-XXX, or MLB-XXX).

~~4. If licensed solely as a mortgage broker, a statement that loans are funded by third party mortgage lenders.~~

~~5.~~ 4. If an advertisement contains a rate of interest, a statement that the stated rate may change or not be available at the time of loan commitment or lock-in.

~~6.~~ 5. If an advertisement contains specific information about a consumer's existing mortgage loan and such information was not obtained from the consumer, a statement identifying the source of such information (e.g., public court records, credit reporting agency, etc.).

B. No mortgage lender or mortgage broker shall deceptively advertise a mortgage loan, make false or misleading statements or representations, or misrepresent the terms, conditions, or charges incident to obtaining a mortgage loan.

C. No mortgage lender or mortgage broker shall use or cause to be published an advertisement that states or implies ~~any of~~ the following:

~~1. A mortgage loan will be funded by a mortgage broker.~~

~~2. A mortgage loan can be approved or closed immediately.~~

3. 1. The mortgage lender or mortgage broker is affiliated with, or an agent or division of, a governmental agency, depository institution, or other entity with which no such relationship exists; or

4. 2. A consumer has been or will be "approved," "preapproved," or "pre-approved" for a mortgage loan, unless a the mortgage lender has issued a written commitment, after a comprehensive analysis of the consumer's creditworthiness (including verification of income, resources, and other matters typically done as part of a normal credit evaluation program), which is conditioned solely upon (i) identification of a suitable property, if the subject property has not yet been identified; (ii) no material change in the applicant's financial condition or creditworthiness prior to closing; and (iii) limitations not related to the financial condition or creditworthiness of the applicant that a mortgage lender ordinarily attaches to a traditional mortgage application (such as completion of a home inspection, an acceptable title insurance binder, certification of a clear termite inspection, etc.) or mortgage broker (i) discloses on the face of the advertisement in at least 14-point bold type that "THIS IS NOT A LOAN APPROVAL" and (ii) clearly and conspicuously discloses the conditions and/or qualifications associated with such preapproval. This provision is intended to supplement the requirements of the Fair Credit Reporting Act, 15 USC § 1681 et seq., relating to firm offers of credit.

D. A mortgage lender or mortgage broker shall not use or cause to be published any advertisement that gives a consumer the false impression that the advertisement is being sent by the consumer's current noteholder or lienholder. If an advertisement contains the name of the consumer's current noteholder or lienholder, it shall not be more conspicuous than the name of the mortgage lender or mortgage broker using the advertisement.

E. A mortgage lender or mortgage broker shall not deliver or cause to be delivered to a consumer any envelope or other written material that gives the false impression that the mailing or written material is an official communication from a governmental entity, unless required by the United States Postal Service.

F. If an advertisement states or implies that a consumer can reduce his monthly payment by refinancing his current mortgage loan, but as a result of such refinancing, the consumer's total finance charges may be higher over the life of the loan, a mortgage lender or mortgage broker shall clearly and conspicuously disclose to the consumer that by refinancing the consumer's existing loan, the consumer's total finance charges may be higher over the life of the loan. For comparison purposes, a mortgage lender or mortgage broker shall assume that the consumer's existing mortgage loan and the proposed mortgage loan remain outstanding until maturity. Total finance charges shall be calculated in accordance with the Truth in Lending Act, 15 USC § 1601 et seq., and Regulation Z, 12 CFR Part 226.

G. Every advertisement used by, or published on behalf of, a mortgage lender or mortgage broker shall comply with the disclosure requirements for advertisements contained in the Truth in Lending Act and Regulation Z, 12 CFR Part 226.

H. For purposes of this section, the term "clearly and conspicuously" means that a required disclosure is reasonably understandable, prominently located, and readily noticeable by an average consumer a potential borrower of ordinary intelligence.

1. For written advertisements, including web pages, disclosures shall be printed in at least 10-point type in order to be considered readily noticeable. For advertisements consisting of multiple pages, disclosures are deemed to be prominently located if they appear on the first page of the

advertisement. If the disclosures appear elsewhere, they are deemed to be prominently located if the first page of the advertisement contains a clear and conspicuous reference to the location of the required disclosures and states the following in at least 10-point type: "Please see important disclosures required by Virginia law."

2. Disclosures that are transmitted by electronic means are evaluated for purposes of the clearly and conspicuously standard based on the form in which they are provided to a consumer, even though they may be viewed by a consumer in a different form.

3. For television advertisements, disclosures shall appear in a size and for a duration sufficient for them to be easily noticed, read, and understood. For radio advertisements or advertisements communicated by telephone, disclosures shall be spoken so that their contents may be easily understood.

I. Every mortgage lender and mortgage broker shall retain for at least three years after it is last published, delivered, transmitted, or made available, a sample an example of every advertisement used, including but not limited to solicitation letters, commercial scripts, and recordings of all radio and television broadcasts, and but excluding copies of Internet web pages and other electronic media.